

E-Filed 5/8/09

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

OMEED P. FARAHANI,

Plaintiff,

v.

CAL-WESTERN RECONVEYANCE
CORPORATION; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.; LITTON
LOAN SERVICING, and DOES 1 through 50,
inclusive,

Defendants.

Case Number C 09-194 JF (RS)

ORDER¹ GRANTING
DEFENDANTS' MOTION TO
DISMISS AND TO EXPUNGE LIS
PENDENS

[re: document nos. 20, 22]

Before the Court are Defendants' motion to dismiss Plaintiff's first amended complaint ("FAC") and to expunge the lis pendens placed by Plaintiff on the subject real property. The Court has considered the moving and responding papers and the oral arguments of counsel presented at the hearing on April 24, 2009. For the reasons discussed below, the motion to dismiss will be GRANTED, without leave to amend. The motion to expunge the lis pendens also will be GRANTED.

¹ This disposition is not designated for publication in the official reports.

I. BACKGROUND

This action arises out of a residential mortgage transaction in which Defendants Cal-Western Reconveyance Corp, Mortgage Electronic Registration Systems (“MERS”), and Litton Loan Servicing (incorrectly sued as Litton Loan Serving) allegedly initiated an illegal non-judicial foreclosure sale . The only defendants that have been served with process are MERS and Litton Loan Servicing (collectively “Defendants”).

Plaintiff Omeed Farahani (“Farahani”) bought a home in Campbell, California on September 07, 2006, which he financed through Fremont Investment & Loan (“Fremont”). According to the Deed of Trust (DOT) Fremont is the “Lender,” Fremont General Credit Corporation is the “Trustee,” and MERS is both the “nominee” for the Lender and the “beneficiary.” Request for Judicial Notice (“RJN”) Exhibit 1 at 2.

After Plaintiff failed to make timely mortgage payments, a Notice of Default was recorded on July 6, 2007. RJN Exhibit 2. A Notice of Trustee’s Sale was recorded on October 10, 2007. RJN Exhibit 3. Plaintiff’s second mortgage was assigned, sold, or transferred from Fremont to Litton Loan Servicing (“Litton”) effective June 1, 2008. According to Defendants, Litton later became a servicer of the loan. Motion to Dismiss at 3. A Trustee’s Deed Upon Sale was recorded on October 24, 2008, documenting the sale of the property at public auction on October 17, 2008. RJN Exhibit 4 at 2. Plaintiff filed the instant action in the Santa Clara Superior Court on or about December 19, 2008. Defendants removed the action to this Court on or about January 15, 2009, based upon diversity of citizenship.²

II. LEGAL STANDARD

A. Motion to Dismiss

“Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Medical Center*, 521 F.3d 1097, 1104 (9th Cir. 2008). For purposes of a motion

² There appears to be some question as to whether all named defendants in fact have diverse citizenship. However, the appearing parties are diverse, and removal to this Court was not opposed by Plaintiff.

to dismiss, the plaintiff's allegations are taken as true, and the Court must construe the complaint in the light most favorable to the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 551 127 S. Ct. 1955 (2007) (internal citations omitted). Leave to amend must be granted unless it is clear that the complaint's deficiencies cannot be cured by amendment. *Lucas v. Department of Corrections*, 66 F.3d 245, 248 (9th Cir. 1995). When amendment would be futile, however, dismissal may be ordered with prejudice. *Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996).

B. Lis Pendens

A lis pendens is a "recorded document giving constructive notice that an action has been filed affecting title to or right to possession of the real property described in the notice." *Urez Corp. v. Superior Court*, 190 Cal. App. 3rd 1141, 1144 (1987). The practical effect of a lis pendens is to cloud the property's title and prevent its transfer until the litigation is resolved or the lis pendens is expunged or released. *Malcom v. Superior Court*, 29 Cal.3d 518, 523 (1981). "The court shall order that the notice be expunged if the court finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim." Cal. Civ. Code § 405.32. "The court shall direct that the party prevailing on any motion [regarding lis pendens] be awarded the reasonable attorney's fees and costs of making or opposing the motion unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust." Cal. Civ. Code § 405.38.

III. DISCUSSION

A. Procedural Objection

"Any opposition to a motion must be served and filed not less than 21 days before the hearing date." Local Civil Rule 7-3. The hearing for both of the instant motions was properly noticed for April 24, 2009. Accordingly, any opposition papers should have been filed on or

1 before April 3, 2009. Opposition to Defendants' Motion to Dismiss was filed on April 16, 2009,
 2 and Opposition to Defendants' Motion to Expunge lis Pendens was filed on April 21, 2009.
 3 Plaintiff has offered no reasonable excuse for this delay. However, because it appears that
 4 Defendants are entitled to prevail on the merits in any event, the Court has considered Plaintiff's
 5 opposition papers.

6 **B. Motion to Dismiss**

7 Non-judicial foreclosure is regulated comprehensively by California Civil Code sections
 8 2924-2924i. *Moeller v. Lien*, 25 Cal.App.4th 822, 830 (1994). "The comprehensive statutory
 9 framework established to govern nonjudicial foreclosures sales is intended to be exhaustive." *Id*
 10 at 834. Plaintiff's opposition to the motion to dismiss is based almost entirely on provision of
 11 the California Commercial Code. The case law cited by Plaintiff that purportedly applies the
 12 California Commercial Code to transfer of a deed is inapposite, as none of the cases cited
 13 involves foreclosure of residential property. While California Commercial Code § 3301 arguably
 14 requires that the foreclosing party have possession of the underlying deed or note, such
 15 possession is not required for a non-judicial foreclosure.

16 A "trustee, mortgagee or beneficiary or any of their authorized agents" may conduct the
 17 foreclosure process. Cal. Civ. Code § 2924(a)(1). "[A] 'person authorized to record the notice of
 18 default or the notice of sale' includes 'an agent for the mortgagee or beneficiary, an agent of the
 19 named trustee, any person designated in an executed substitution of trustee, or an agent of that
 20 substituted trustee.'" *Candelo v. NDex West, LLC*, 2008 WL 5382259 at 4 (E.D.Cal.2008) citing
 21 Cal. Civ. Code § 2924(b)(4). The notices of default and trustee's sale recorded against the
 22 property at issue here were managed by Cal-Western Reconveyance Corporation, which is listed
 23 as "either the original trustee, the duly appointed substituted trustee, or acting as agent for the
 24 trustee or beneficiary under a deed of trust." Notice of Default, RJN Exhibit 2 at 2. Plaintiff
 25 does not claim that the Defendants are unrelated or do not act as a beneficiary, trustee, or agents
 26 for each other. Rather, the documents incorporated by reference in the pleadings make clear that
 27 each named Defendant had a role in executing the various steps leading up to foreclosure
 28 pursuant to California Civil Code §§ 2924 through 2924i. "Upon default by the trustor, the

beneficiary may declare a default and proceed with a nonjudicial foreclosure sale.” *Moeller*, 25 Cal.App.4th at 830.

Plaintiff makes five claims in his first amended complaint. The first (declaratory relief), second (injunctive relief), and third (quiet title) claims are subject to dismissal because each relies on the allegation that the Defendants had no authority to foreclose on the property because they were not in possession of the deed. Plaintiff concedes that claims four (wrongful foreclosure) and five (specific performance as against Litton) also should be dismissed. Accordingly, all five claims will be dismissed, as the entirety of the instant action is premised on Plaintiff’s erroneous assertion based upon the California Commercial Code. It is apparent that Plaintiff cannot cure this defect by amendment. Accordingly, dismissal will be without leave to amend but without prejudice to a valid claim under the proper statutory framework.

C. Motion to Expunge Lis Pendens

In light of the foregoing, Defendants’ motion to expunge the lis pendens also will be granted. However, in light of the totality of the circumstances and Plaintiff’s apparent financial hardship, the Court declines to award attorneys’ fees to Defendants at this time.

IV. ORDER

Defendants’ motions to dismiss and to expunge the lis pendens are GRANTED. The Clerk shall enter judgment and close the file.

DATED: 5/7/09


JEREMY FOGEL
United States District Judge

Copies of Order served on:

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